IN THE

Supreme Court of the United States

OCTOBER TERM

NO. [illegible]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

[illegible]

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IN THE

Supreme Court of the United States

OCTOBER TERM

No.

THEODORE KAGEN CORP., ET AL., *Petitioner*

v.

FEDERAL TRADE COMMISSION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

B. Paul Noble, Attorney for Theodore Kagen Corp., A corporation, and Theodore Kagen, prays that a Writ of Certiorari issue to review the judgment entered in the above case on the 29th day of September 1960 by the United States Court of Appeals for the District of Columbia Circuit, affirming an order of the Federal Trade Commission.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A), is reported at 283 F.2d. 371.

JURISDICTION

The judgment of the Court of Appeals (Appendix B), was entered on September 29th, 1960. The Court of Appeals entered its Final Decree Enforcing Order to Cease & Desist on October 27, 1960. (Appendix C). The time for filing a Petition For Writ of Certiorari was extended by order of associate Justice Brennan on December 27, 1960 up to and including January 30, 1961. (Appendix D).

The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254 (1):

QUESTIONS PRESENTED FOR REVIEW

1. Whether the fact that order of the Federal Trade Commission in this matter is so inconsistent with the Federal Trade Commission's own trade practice rules as to make such order abhorrent to public policy and therefore unlawful.

2. Whether an order of the Federal Trade Commission the effect of which does the following:

(1) Strikes down a legitimate industry wide practice;

(2) Forces petitioner to perform a vain and useless act;

(3) Forces petitioner to perform an act tending to confuse the public;

(4) Forces petitioner to make a misleading statement;

is so remote from the purposes of the Federal Trade Commission Act, and so abhorrent to logic and good sense as to be classified arbitrary and capricious and therefore unlawful.

3. Whether the fact that the Commission's order in this case is so inconsistent with rulings, findings, and order in a parallel case before it as to be classified as capriciously discriminatory, contrary to proper administrative practice and thus unlawful.

STATUTES INVOLVED*

Section 5, the Federal Trade Commission Act;* 38 Stat. 711, as amended, 52 Stat. 111, 66 Stat. 632; 15 U.S.C.A. 45 (a)(1), (6);* (c); (d); (e); 49.

RULES

Federal Trade Commission Trade Practice* Rules for the Watch Case Industry. As promulgated Jan. 30, 1948. Rules 2(L), 2(M), 2(N).

STATEMENT OF THE CASE

Federal jurisdiction in the Court below was based upon the Federal Trade Commission Act: 16 U.S.C.A. 45 (c), (d) & (e).

The Federal Trade Commission issued its complaint (J.A.,[1] 1-6) on September 27, 1957. This complaint charged respondents, Theodore Kagen Corp., a corporation, and Theodore Kagen, individually, with violation of the Federal Trade Commission Act. Specifically, respondents were charged with making three different types of misrepresentations to the purchasing public. These were, first, that respondent marked

* The text of the provisions of section 5 of the Federal Trade Commission Act; and Rules 2(l), 2(m), and 2(n) of the Trade Practice Rules for the Watch Case Industry, are pursuant to the provisions of Rule 23.1, (c) set forth in the Appendix to this petition, infra, Appendix F.

[1] J.A. refers to the Joint Joint Appendix in the Court of Appeals.

their watch cases as "water resistant" and "water protected" when such cases were neither water resistant nor water protected. (J.A., para. 3, 3 and 4); second, that respondents marked the back of their watch cases as "stainless steel back" only, when these watch cases had bezels composed of aluminum treated or processed to simulate the appearance of gold, and that respondents practice of not disclosing that said bezels were base metal was misleading and deceptive; (J.A. p. 3, para. 5); third, that respondents represented themselves to be manufacturers of their watch cases, that the public has a prefereince to purchase from manufacturers, and that respondents were not manufacturers. (J.A., p. 4, para. 6 and 7).

Administrative Hearings were held before a duly designated hearing examiner at various times and places commencing January 14, 1958 and ending August 1, 1958.[2] On April 3, 1959, the hearing examiner issued his initial decision and order (J.A. 92-97) dismissing charges set out as 1 and 3, false representation of "water resistant" and "water protected", and false representation of being "manufacturers". The hearing examiner sustained charge 2, misrepresentation by failure to disclose that the bezel of respondents watch case was base metal, when it simulated the appearance of gold, and found this practice had the capacity and tendency to deceive the purchasers, and issued order. The Commission, on November 29th, 1959, affirmed and adopted the hearing examiners decision in toto (J.A. 98) along with opinion (J.A. 99-104).

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[2] Transcript of hearings as designated for purposes of appeal before the Court of Appeals appears at pages 9-98 in the Joint Appendix.

On November 19th, 1959, petitioners filed in the Circuit Court of Appeals for the District of Columbia a Petition to review the order of the Federal Trade Commission (J.A. 104-108). After hearing in open court the Circuit Court of Appeals issued Judgment affirming the Order of the Federal Trade Commission on September 29, 1960. (Appendix B, infra.), and issued Final Decree Enforcing Order to Cease & Desist on October 27, 1960. (Appendix C, infra).

Facts Not in Dispute

The watch cases referred to in the complaint issued by the Federal Trade Commission are composed as alleged of base metal parts. The backs of these cases are composed of stainless steel and the bezels of such cases are composed of an anodized aluminum which is yellow, or gold colored, or chrome or silver colored. Such cases were also marked "Stainless Steel" back as alleged in the complaint. No reference was made on any of the watch cases in question to the metallic content of the bezels. The cases (Joint Exhibits A., B., C., J.A. 109) were always referred to on petitioners' invoices as "yellow", (Commission Exhibits 6A and B, 7A and B, J.A. 121-124). The anodized aluminum bezels of these watch cases contained some gold. (J.A. P. 36-37).

Facts in Dispute

The fact as to whether the watch cases in issue had the capacity and tendency to deceive a prospective purchaser is really the sole factual issue involved in this case.

The hearing examiner's opinion appeared to rely solely on the appearance of the watch cases themselves, (J.A. 96 para. 14 and 15), and thus would appear to

rely exclusively on expertise. The opinion of the Commission on the other hand indicates it felt that the conclusion of capacity and tendency of deception was corroboratted by expert testimony, including testimony of a "skilled" member of the industry, who stated he was deceived (J.A. 99-103). The Commission decision then puts the Commission on record as holding that substantial evidence in addition to the appearance of the watch cases themselves was relied upon in arriving at the conclusion reached in its decision. The petitioners' contend that there was no such substantial evidence and the difference between the two positions becomes important in light of the theory of petitioners' that the rulings and order of the Commission in this case are inconsistent with the Commission's own Trade Practice Rules for the Watch Case Industry and further inconsistent with a parallel case previously decided by the Commission. For if it is true that no such substantial evidence was in existence, it would certainly appear that there could be no justification for the Commission to allow an inconsistency to exist between the instant decision and the Trade Practice Rules or a prior parallel ruling.

The pertinent testimony that the Commission referred to consisted of but one purchaser, and various experts in the field. Of these various witnesses, only one testified, that he was deceived by the appearance of the petitioners' watch cases. This was the witness Isadore Zuckerman, a competitor of the petitioner, who first identified petitioner's watch cases as "yellow", and after what appeared to be a bit of leading, stated he thought the watch had a bezel composed of rolled gold plate (J.A. p. 10). This, despite the fact that this same witness subsequently identified invoices ac-

companying the watch cases which characterized the cases as "yel", for yellow (J.A. 11-12, Commission Exhibits 6A and B, 7A and B, J.A. 121-124), and, who further testified on cross examination that no one, including petitioner Theodore Kagen ever represented the cases as gold, that he, the witness, paid Kagen only $1.50 per case, and usually paid $3.00 to $3.25 per case for gold cases, that he made no inquiry at all as to whether the cases were gold, that rolled gold cases were heavier than petitioner's cases, and that he had been in the watch business 30 years. (J.A. 15-16). Standing alone, while the testimony of the lone witness Zuckerman might appear incredible, petitioners will concede the Commission might still have the necessary administrative discretionary powers to believe him. However, when the further testimony of the Commission's own expert witnesses established that when gold or other precious metal existed in a watch case it was always indicated on both the invoice and the watch case itself, the lone testimony of the expert, Zuckerman, could not stand. Indeed, the hearing examiner made no reference to it at all. Mr. Hubert Breitman, technical advisor, Bulova Watch Company, a Commission witness, indicated that where gold existed in Bulova watch cases, it was always indicated on the invoice and the watch case, and where there was no gold in the bezel of the watch case no reference would be made to the metallic content of anything save the back: (J.A. 30-32).[3] This exactly the practice followed by petitioners. This same practice of marking "stainless steel

[3] The crucial question put to Mr. Breitman was as follows: J.A. 32-118. Q. Anytime that you assemble and later retail a watch case which does not contain a precious stone, precious metal in the Bezel, the marking on the back will not indicate anything except the metallic content of the back, correct? A. Yes.

back" on watch cases composed of a stainless steel case and base metal bezel was followed by virtually all of petitioners' competitors and they so testified that indicating solely "stainless steel" on the back meant the bezel was not composed of any precious metal. This was the testimony of Hyman Dinstman, I.D. Watch Company (J.A. 61-64), Sheldon Parker, W.M.R. Watch Case Co., (J.A. 42), the proven practice for Timex Watches (J.A. 53), and as petitioner himself stated was the industry wide practice. (J.A. 90-91).

It would appear a clear fact, then, that the entire watch industry for many years had followed the practice of marking watch cases to indicate precious metal composition of the bezel only when the bezel was composed of precious metal, and marking only the composition of the backs when there was no precious metal in the bezel. Certainly, it may be drawn from this that the public has been trained for many years to understand that unless gold or other precious metal content is indicated by marks on a watch case then that watch case has no gold, or other precious metal. Certainly, common sense and experience impels this conclusion.

Judicial Review

On Petition To Review (J.A. 105) respondent appealed to the Circuit Court of Appeals for the District of Columbia.

That Court on September 29, 1960 entered a per curiam opinion (Appendix A, infra).

REASONS FOR GRANTING THE WRIT

The following are the special, important reasons why this Writ should be granted:

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

2. The Court of Appeals has sanctioned a departure from the accepted and usual course of administrative proceeding and determination.

3. The Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same point of law.

The Trade Practice Rules

The first grounds of error on which petitioners' rely is that the order of the Commission in this matter (J.A. p. 97, 98) and the order as interpreted by the Circuit Court of Appeals (Appendix A, Infra) is inconsistent with the Trade Practice Rules for the watch case industry promulgated by the Federal Trade Commission, itself. The three rules cited in the appendix to this brief, rules 2 (L), 2 (m), 2 (n), when read together clearly indicate that the disclosure of the bezel composition of petitioners' watch cases is clearly not required, and that disclosure as made by the petitioner is in substantial conformity with the rules.

Rule 2(L) reads as follows:

"(L) *Base Metal Cases Simulating Precious Metal.* In respect of watch cases composed wholly of base metal manufactured or otherwise processed to simulate or have the appearance of precious metal, and cases composed wholly of base metal manufactured or

otherwise processed to simulate or have the appearance of precious metal and cases composed of an alloy containing gold of less than 10 Karat Finess, the mark shall show that said case is base metal, as for example—

Base Metal
or
Stainless Steel
or
Nickel
or
Nickel Plated
or
Chromium
or
Chrome Plated Steel
or
Brass".

This rule itself indicates that the Commission considers the use, of the generic term base metal, and the specific name designations of such base metals as interchangeable. This would certainly indicate that the Commission by its rules considers specific metallic content designation as unessential to avoidance of deception. Indeed, the Court of Appeals Opinion (App. A. Infra) precluded all disclosure, but base metal. Yet, the Commission has urged that the rule is inapplicable; because the watch cases in question were composed of two base metals, stainless steel for the backs, and aluminum for bezels. (Joint E. A, B, C.)

Looking at rule 2 (m) (App. F, infra. p.) the Commission's point would appear to be well taken. For

that rule requires setting out both the composition of the back and the bezel as an example the rule provided:

> "Base Metal Back 14 K Gold Filled Bezel
> [to be shown together or at one place on the case]"

However, this rule is followed immediately by rule 2 (n) (App. F, Infra), this rule is prefaced as follows: "*Marking, of Minimum Quality in Lieu of Multiple Stamping.*" In essence, this rule provides that where the watch case has parts composed "of gold alloy of different fineness or quality" the watch case may be marked with the quality and fineness of "the lowest grade". The Commission asserted before the Court of Appeals that the rule does not apply to petitioners' watch cases as the rule would apply only to watch cases all of the parts of which are composed of gold (See p. 20 Commission's brief before the Circuit Court of Appeals).

Yet, appended to the rule (App. F, Infra) second sentence under the parenthesis reads as follows: "If such plating or electroplating is of an alloy containing less than the equivalent of 10 karats of gold, the part of the case so constructed shall also be deemed base metal". This clearly indicates the Commission contemplated description of base metals under this rule. The petitioners' watch case then had some gold in the bezel. This was established by the Commissions' own expert. (J.A. 36-37.) The petitioner under the rule stamped "Stainless Steel Back", a base metal thus giving the least precious designation of metallic content. It is hard to conceive how such a practice was not in conformity with both the technical requirements and the spirit of the rule. Indeed, it was established

clearly in the record that this was an industry wide practice. (J.A. 30-32, 61-64, 42, 53, 90-91).

Yet, the Commission has maintained that the established law is that the Trade Practice Rules are merely advisory, that the Commission cannot be estoped from issuing Order on the basis of petitioners' conformity to the rule. The law on the point is not actually as well established as the Commission would have one believe. In *American Life & Accident Insurance Co.* v. *F.T.C.*, 255 F. 2d 289 (C.A. 8th, 1958), the Court's attention is respectfully drawn to the very strong dissenting opinion of Judge Johnsen. While the majority opinion in the case made but short mention of the cooperation of the respondent in that cause, and did not mention the pertinent Trade Practice Rules, Judge Johnsen appeared to point clearly to a growing problem facing businessmen who must deal with the Commission on a continual basis.

At page 294, the learned Judge stated as follows:

"The Federal Trade Commission promulgated Trade Practice Rules Relating to the advertising and sales Promotion of Mail Order Insurance", 15 Fed. Reg. 955. It invited members of the industry to become signatories to those Rules, in indication of any such member's desire to secure cooperative achievement, both in its own business and in the field generally, of the purposes of the Act. It set up a Rule Administration Division, in facilitation of this endeavor, to enable any signatory, among other things, to submit its form of advertising and solicitation for scrutiny and suggestion, with either expression or implication of sanction or approval, as being in conformity with the standards of the Rules and so presumptively nonviolative of the Act. It allowed the Staff of its Rules Division to exercise the function of advisorly engaging in such sanc-

tions and approvals of forms of advertising and solicitation thus submitted. Then, in petitioners' case, it stepped in without revocation of the Rules, without notice of repudiation, and without request on petitioner to cease further use of such materials, filed a complaint requiring petitioner to show cause why a cease and desist order should not be entered against it, and on hearing, with no challenge as to the good faith of the seeking or granting of such approval, entered a cease and desist against petitioner, as a violator of the Act, in having made use of some of such Staff-sanctioned advertising and solicitation forms."

"It seems to me that this constituted fundamental lack of fair play in administration and processive arbitrariness in hearing. I do not believe that a use of advertising or solicitation forms, under trade practice rules promulgated by the Commission and under sanctioning procedures authorized by it in relation thereto, can constitute such "deceptive acts or practice" as the act contemplates should be made the subject of a cease and desist proceeding, and on which the Commission may presume to speak—until after there has been a removal of its administrative insulation."

"That administrative insulation has, of course, now been removed in the present situation by the indications made in the rulings and the results of this proceeding. But in effecting the deinsulation, the Commission should not, within the purpose and spirit of the statute, be allowed to pillory petitioner as a law violator, in the fists of its competitors and in the eyes of the public, for what was done, not as petitioners' act alone, but as an act of purported administrative insulation."

The opinion above reflects a clear understanding of the administrative process and its terrible tendency to abuse. If anything, the fact that this proceeding is before the Court today shows that a situation which had become near malignant in 1958, has rather than improved, instead become awesomely cancerous in the year 1961. Surely, it strikes at the heart of a concept of "fair play" long nutured by this judicial system, and is so foreign to American judicial philosophy, and so repugnant in individual taste for principles long installed, admired and set forth for evaluation, as to shock and outrage those who through one means or another become familiar with it. Yet, the present proceeding stands on all forms with *American Life & Accident Ins. Co.* v. *F.T.C.* and the Commission itself, cited this case as authority for its position. (See brief of Commission before the Circuit Court of Appeals, p. 11). It is urged that this dissenting opinion of Judge Johnsen far better reaches the problem, than the majority opinion which made but scant reference to the issue and talked in terms of "abuse of discretion". For if the agencies of the Government of the United States are not to be held to standards and concepts of "fair play" then who in the entire country is to be so held. No other case researched would appear to come as closely on the point as does the case discussed above. In *Standard Distributor* v. *F.T.C.*, 211 F. 2d 7, 13 (C.A. 2nd, 1954) the Commission was held not bound to its own rules when it was shown that although respondent made a sincere attempt to get its salesmen to obey the rules, the salesmen in their capacity as such persistently violated them. In *Northern Feather Work* v. *Federal Trade Commission*, 234 F. 2d 335 (C.A. 9, 1956) the Court held that while Trade Practice Rules were not legally binding they could be taken

as a guide by both the Commission and the Courts. In *Book-of-the-Month Club* v. *F.T.C.*, 202 F. 2d 486, 489 (2nd Cir. 1953) while the petitioners raised the point as to whether or not the Commission adopted and followed a "rule" the Court held that such "rule" was not essential to the Commission's decision in the light of a Supreme Court case.

Thus, it would appear that save for the lone dissenting voice of Judge Johnsen (infra.) and the scant mention in the majority opinion in American Life & Accident Insurance (supra.) no Court has as yet met the problem head on. It is interesting to note in this connection that in a case before the Commission, itself, *In the Matter of Arnold Constable*, Docket 7106, 1958, the Commission did dismiss its own complaint when it was shown that a responsible official in the Commission had condoned by letter a practice which was the subject of the Commission complaint. In view of such action certainly one has cause to wonder why the same procedure was not followed in the instant case.

The petitioner urges upon the Court that the practice of the Commission in setting up rules of conduct for an industry and rewarding the obedience to such rules by issuance of complaint and eventually cease and desist order is one which should not be condoned. The petitioner further urges that the impact of the question goes far past the petitioners' own cause as it will affect many and varied industries, and is therefore a problem which at this time is worthy of the Court's consideration.

The Order of the Commission and the Order of the Circuit Court of Appeals

The order of the hearing examiner (J.A. 107), which became the order of the Commission (J.A. 107) read in its prohibitive text as follows:

"... do forthwith cease and desist from offering for sale or selling watch cases composed in whole or in part of base metal which has been treated to simulate precious metal, without clearly disclosing on such cases the true metal composition of such treated cases or parts".

The Circuit Court of Appeals modified this order in its opinion on September 29, 1960 (Appendix A, infra), as follows: "Commission Counsel advised us in oral argument, in response to a question from the bench, that the order may be interpreted to require no more detailed disclosure than that the treated cases or parts are composed of base metal as so interpreted the order is affirmed."

The order both before and after modification suffers from fatal defects. The first thing that the order affects is what is clearly a legitimate industry wide practice. That is, it is established on this record that the industry for quite some time has been marking watch cases in exactly the same manner as the petitioner (J.A. 30-32, 61-64, 42, 53, 90-91). It is further clear that watch cases have been marked in this manner because the industry as a whole has developed the practice of indicating gold content only when such exists (J.A. 61-64). The logical inference that then follows irreputably is that the public has been trained to look for an indication of gold content, or other precious metallic content to establish that such exists in the particular watch purchased.

Yet, the Commission attempts to put the case at hand within the doctrine of *F.T.C.* v. *Winstead Hosiery Co.*, 258 U.S. 483. Petitioner readily concedes that the *Winstead* case is landmark, and that it established that a respondent charged with violation of the Federal Trade Commission Act could not offer as a defense that an unfair practice was justified because it was performed by the particular industry involved as a general practice. But the petitioner does not concede the *Winstead* case to mean that a legitimate industry practice could be nullified under this doctrine. What this record clearly demonstrates is that the public over a course of many years has been educated to believe that unless gold content, or other precious metallic content is indicated, on a particular watch case, then the watch case has no gold content, or other precious metallic content. This stands on the record uncontroverted. Yet, the Commission has overcome this problem by use of its expertise, and the testimony of a single witness, Zuckerman. (J.A. 10-11).

But the logic of the Commission's decision and order falls by the weight of its own mandate, when it is seen that the order would definitely require the use of the term "bezel" in describing a component part of the case. Common sense must suggest, surely, that hardly a person exists outside the industry who would know just what a "bezel" is. For all the public knows the "bezel" might be a mainspring. Thus, while it might very well appear that experts at the Commission might well be satisfied with the term, it is difficult to see how the public interest would be served by adding to the back of the watch case a term known to virtually no members of the purchasing public. Under the circumstances the order appears to require a vain and useless act, and also an act which might well create confusion.

To add, to what petitioners contend is an already a confused situation, the Commission's order in this case reaches the height of absurdity when it is considered that the order not only requires a vain and useless act, but requires a falsification of fact. The bezel under the order is to be characterized as base metal, yet, the Commission's own expert testified that it contains some gold. (J.A. 36-37).

The petitioner is well aware that the Courts have granted the Federal Trade Commission great latitude in the exercise of its expertise. Petitioner is further aware that the principal is well established in this field that under the Federal Trade Commission Act actual deception need not be shown, that a tendency and capacity is sufficient to justify administrative action. *Zenith Radio Corporation* v. *F.T.C.*, 143 F. 2nd 29 (7th Cir. 1944), *Royal Oil Corporation* v. *F.T.C.*, 262 F. 2nd 741 (4th Cir., 1959), *Ford Motor Corporation* v. *F.T.C.* 120 F. 2d 584 (1957), *Raladam* v. *F.T.C.* 316 U.S. 199 (1942). However, it is not felt that the above cases established the principle that the Commission had license to ignore reason, or logic, or as in this case, even Common Sense. Actions which can be characterized as arbitrary and capricious cannot be sustained even when such actions are committed by government agencies.

The petitioner contends that the factual issues in this case are of a simple nature, and asserts that the action of the Commission in putting under the awesomeness of its order a manufacturer who has followed a simple, earnest and uncomplex industry practice, and threatens to force him to a position of useless, complicated, and confusing actions, stretches to the limit the endurance of both industry and public of governmental regulations.

Petitioners are also well aware of the proposition that the Federal Trade Commission Act is for the protection of the unthinking and ignorant, in addition to the so-called average man. *Charles of the Ritz Dist. Corp.* v. *F.T.C.*, 143 F. 2d 676, 679 (2nd Cir. 1944). However, petitioners most respectfully urge that there is a limit to this principle. How, is an unthinking, ignorant man to be aided by the use of the term "bezel"? How are the credulous to be helped by the term "base metal"? If in the final analysis we must gear all of industry to the most illogical and unlikely thoughts and conclusions of the multitude one has cause to wonder if any decision of the Federal Trade Commission is assailable, no matter how absurd.

The Inconsistency of the Commission Order in This Case With a Parallel Case in the Watch Industry

The petitioners have maintained throughout these proceedings that Commission decision in the instant case is fatally inconsistent with the Commission decision in the matter of *Swiss Watch Company*, Docket No. 7040 (J.A. 102). The Commission on the other hand has maintained that adequate distinction existed between the two cases to justify different results.

The pertinent issue involved in *Swiss Watch* (Supra.) concerned a watch case composed of brass, treated to simulate silver, with only the disclosure "stainless steel back" appearing on the case. This is exactly the principal involved in the present proceeding. The hearing examiner stated in his opinion as follows:

"The third type bezel is brass, treated with copper or nickel and then chrome plated but not so marked. Here the complaint is that chrome simulates silver and the

purchaser thinks his bezel or the entire case is silver when it is, in fact, only chrome plated brass. Since the back is plainly marked "stainless steel back" deception as to the whole case is impossible. As to the bezel, only the difference between silver and chrome is instantly discernible. I cannot see from the exhibits in the record how any ultimate purchaser could be misled that a chrome-plated bezel was silver, or vice versa. The change is not made out and the verdict is a scotch one —not proved."

The above expertise reaches, of course, a position diametrically opposed to the expertise in the instant case, and its adoption by the same Commission which ruled in the instant proceedings would suggest a most improper abuse of administrative discretion. Yet, this is precisely the situation which occurred. For the Commission affirmed the order and opinion of the hearing examiner as set out above, and with specific reference to the issue stated as follows:

"The finished case exhibit referred to in the appeal brief of counsel supporting the complaint as flashed with a thin coating of gold has various markings on the back, including "base metal", "20 Micron", and "Stainless Steel Back". Assuming, but not however deciding, that an issue in that regard is presented under the pleadings, the initial decision's conclusion of failure or proof concerning the bezels being passed off as gold bezels accordingly appears free from substantial error. Also rejected are all counsel's exceptions to like rulings concerning the failure to mark the chrome plated bezels".

It is true that the Comission referred to the inadequacy of the pleadings. But looking at the two complaints, *Swiss Watch & Kagan* it is hard to discern the

difference between the two; save that in the instant case the practice of not marking disclosure is described as "misleading and deceptive and has a substantial capacity to deceive". (J.A. 3) (See para. 5 of the Complaint) which is repetitious of paragraph nine, just as it would have been repetitious if used in the *Swiss Watch Case*. But even assuming there was a difference in the pleadings between the two cases, has not the Commission held the hearing examiner's ruling "free from substantial error", and thus held as a matter of *expertise* that the appearance of the watch case, silver or gold colored, marked "stainless steel back" is not deceptive per se. And this being the case is the character assigned to these watch cases, then to be changed by a single witness, the witness Zuckerman (Infra p. 7), who it will be recalled had been in business 30 years, paid half the price for petitioners' cases as he would for gold cases, received invoices marked "yel", for yellow, and made no inquiry as to whether the cases were gold, and this in an industry where the practice of not marking the content of the bezel when no precious metallic content was present, was universally followed. (Infra, p. 8)? Petitioners' earnestly urge that such rationale which might well stand by itself cannot be allowed to stand when two respondents stand in point of time almost simultaneously before the Commission. Such administrative inconsistency surely must be considered arbitrary and capricious.

Yet petitioners appear not to be alone. The problem of inconsistent treatment of respondents' is a problem facing the Courts in other Commission cases. In *Elliot Knitwear* v. *F.T.C.*, 266 F. 2d 787 (2nd Circ., 1959) the second Circuit reissued and remanded the cause back to the Federal Trade Commission on precisely

these grounds In that case the Commission ordered the exclusion of the trade name "Cashmora" even though beneath this name full disclosure of the actual fibre contents, Angora, and Lambs Wool was made. The Court noted that the Commission in *Jacob Siegal* v. *F.T.C.*, 327 U.S. 608, had eventually allowed Jacob Siegal to use the trade name of "Alpacuna", if the Siegal would disclose the true fibre content below the name Alpaca, Mohair and Wool. As in the present case the Commission attempted to rationalize the difference between the treatment of the two respondents. The rationale of this being to the effect that at least the trade name carried within it the syllabic content of at least one of the actual fibres, alpaca. The Court in rejecting this argument chose to stay with the broad legal principle at page 789, the Court stated as follows:

"If specifying of the fibre content was sufficient to cure the deception in Jacob Siegal, it must follow that a similar specification of the fibre content in the present case precludes the Commission from holding the label deceptive per se."

It is respectfully submitted that the above decision in *Elliot Knitwear* is well reasoned and is directly on point in the instant proceedings. For, indeed, if *Swiss Watch's cases* are not deceptive, per se, then can *Kagen's* watch-case be deceptive per se. Yet, aside from the testimony of the single witness, Zuckerman, (Infra p. 3) the Commission in the instant case must fall back on its expertise. Petitioners plead that such retreat not be allowed at the expense of reason and simple justice

CONCLUSION

The decision below presents grave and important questions which go beyond the immediate concern of petitioners, and will effect in its scope many industries. Up for consideration are questions of the effect of the Federal Trade Commission's Trade Practice Rules, the nature and propriety of Commission orders, and other in consistency of treatment of respondents before the Federal Trade Commission. For these important reasons petitioners urge that this petition for Writ of Certiorari should be granted.

Respectfully submitted

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CERTIFICATE OF SERVICE

Certified that a copy of the foregoing Petition for Writ of Certiorari was mailed this ..... day of ..... 1961, postage prepaid to Miles Brown, Esq., Federal Trade Commission, Washington, D. C., Alan B. Hobbes, Esq., Federal Trade Commission, Washington, D. C., office of the Solicitor General, Justice Department, Washington, D. C.

B. PAUL NOBLE
Attorney for Petitioner

APPENDIX A

(Federal Trade Commission Docket 6893)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15541

THEODORE KAGEN CORP., a corporation, *et al.*,
PETITIONERS

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review an Order of the
Federal Trade Commission

Decided September 29, 1960

Mr. Alvin D. Edelson, with whom *Mr. Ben Paul Noble* was on the brief, for petitioners.

Mr. Miles J. Brown, Attorney, Federal Trade Commission, with whom *Mr. Alan B. Hobbes*, Assistant General Counsel, Federal Trade Commission, was on the brief, for respondent. *Mr. E. K. Elkins*, Attorney, Federal Trade Commission, also entered an appearance for respondent.

Before EDGERTON, DANAHER, and BASTIAN, *Circuit Judges*.

PER CURIAM: Oral testimony together with exhibits convinced the Commission that base-metal bezels of petitioners' watch cases could be mistaken for precious metals, because of their appearance, in the absence of clear disclosure to the contrary. Substantial evidence supports this finding. The Commission ordered petitioners to cease "Offering for sale or selling watch cases composed in whole or in part of base metal which has been treated to

simulate precious metal, without clearly disclosing on such cases the true metal composition of such treated cases or parts." Commission counsel advised us in oral argument, in response to a question from the bench that the order may be interpreted to require no more detailed disclosure than that the treated cases or parts are composed of base metal. As so interpreted, the order is

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,541

September Term, 1960

THEODORE KAGEN CORP., a corporation, et al., *Petitioners,*

v.

FEDERAL TRADE COMMISSION, *Respondent.*

On Petition to Review an Order of the Federal Trade Commission.

Before: Edgerton, Danaher and Bastian, Circuit Judges.

Judgment

This case came on to be heard on the record from the Federal Trade Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is ordered and adjudged by this court that the order of the Federal Trade Commission on review in this case is affirmed.

It is FURTHER ORDERED by the court, pursuant to Rule 38(b), that the respondent within ten days submit a proposed enforcement degree in conformity with the opinion of this court.

Per Curiam.

Dated: September 29, 1960.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,541

September Term, 1960

THEODORE KAGEN CORP., *a corporation*, etc., et al.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, *Respondent*.

Before: Edgerton, Danaher and Bastian, Circuit Judges, in Chambers.

Final Decree Enforcing Order to Cease and Desist

Petitioners herein having filed in this Court on January 29, 1960, a petition to review and set aside an order to cease and desist issued against them on November 19, 1959, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of *Theodore Kagen Corp.*, a corporation, and *Theodore Kagen*, individually and as an officer of Theodore Kagen Corp., and doing business as T. K. Co., Docket No. 6893;" and a copy of said petition having been served upon respondent and respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in said proceeding; and the matter having been heard by this Court on briefs and oral argument on September 19, 1960, and this Court having thereafter fully considered the cause and having rendered its decision on September 29, 1960, affirming said order, as interpreted in said decision:

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, by this Court that the aforesaid petition to review and set aside the order of the Federal Trade Commission be, and it hereby is, denied; and

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that the order to cease and desist, as heretofore affirmed, be, and it hereby is, enforced, and that petitioners be, and they hereby are, ordered to obey and comply with the terms of the aforesaid order.

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Commission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, hereby enforced, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

United States Circuit Judges

Entered: October 27, 1960.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
October Term, 1960

No. .....

THEODORE KAGEN, a corporation et al., *Petitioner*

v.

FEDERAL TRADE COMMISSION

Order Extending Time to File Petition for Writ of Certiorari

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 30, 1961.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme
Court of the United States

Dated this 27th day of December, 1960.

APPENDIX E

Statutes Involved

Federal Trade Commission Act

The pertinent provisions of the Federal Trade Commission Act; 38 Stat. 717, as amended; 52 Stat. 111; 66 Stat. 632; 15 U.S.C.A. 41-58.

Sec. 5 (a) (1)

15 U.S.C.A. 45 (a) (1)

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce are hereby declared unlawful.

Sec. 5 (a) (6)

15 U.S.C.A. 45 (a) (6)

The Commission is hereby empowered and directed to prevent . . . from using any unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Sec. 5 (c)

15 U.S.C.A. 45 (c)

Any person, partnership or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the Court of Appeals of the United States within any Circuit where the method of competition or the act or practice in question was used or where such person . . . resides or carried on business, by filing with the Court, within sixty days of service of such order, a written petition praying that the order of the Commission be set aside . . . Upon such filing of the petition, the Court shall have jurisdiction of the proceedings and of the questions determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying or

setting aside the order of the Commission, . . . the findings of the Commission as to the facts, if supported by evidence, shall be conclusive . . . The judgment and decree of the Court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

Sec. 5 (d)

15 U.S.C. 45 (d)

Upon filing of the record with it, the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Sec. 5 (e)

15 U.S.CA 45 (e)

Such proceedings in the court of appeals shall be given precedence over other cases pending therein . . .

Sec. 9 (par. 4)

15 U.S.C.A. 49

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of sections 41-46 and 47-58 of this title or any order of the commission made in pursuance thereof.

APPENDIX F

(1) *Base Metal Cases Simulating Precious Metal:* In respect of watch cases composed wholly of base metal manufactured or otherwise processed to simulate or have the appearance of precious metal, and cases composed of an alloy containing gold or less than 10 karat fineness, the mark shall show that said case is base metal, as for example—

Base Metal

or

Stainless Steel

or

Nickel

or

Nickel Plated

or

Chromium

or

Chr. Plated Steel

or

Brass

(m) *Cases Having a Combination of Different Metals:* In respect of watch cases having a back and bezel composed, respectively, of a different kind or quality of metal, the disclosure for marking provided for in the foregoing provisions of this Rule shall be made in the manner indicated therein with respect to each such respective parts, as for example—

Base Metal Back

14K Gold Filled Bezel

[To be shown together or at one place on the case]

When two or more parts of the case do not have the appearance of being made of the same quality or kind of metal, as for example, when the bezel of such a case is of gold filled quality and the back is stainless steel, the marking used under this paragraph (m) may be separated as illustrated in the following:

Stainless Steel

[Placed on the back]

14K Gold Filled

[Placed on the bezel]

In the separation of marks here specified such sufficient care must be exercised as will avoid possibilities of deception or confusion.

(n) *Marking of Minimum Quality in Lieu of Multiple Stamping:* In respect of watch cases in which the case itself has parts composed of gold alloy of different fineness or quality, or has parts which are plated or coated with different thickness of plating or electroplating as specified in paragraphs (b), (c), (c-1), (d), and (d-1) above, such watch case may be marked with the quality and fineness of the lowest grade as an optional method in lieu of marking each such different piece or part, as for example, the mark of "12K Rolled Gold Plate" for a case which is composed entirely of such 12 karat rolled gold plate with the exception of the bezel which is of a higher quality, such as "14K Gold Filled." In no instance, however, shall this optional form of marking be utilized in such manner or under such conditions as may be deceptive or misleading to the public.

(In the application of this Rule platings or electroplatings which are of less than 1½/1000 of an inch thickness on base metal shall be deemed base metal. If such plating or electroplating is of an alloy containing less than the equivalent of 10 karats of gold, the part of the case so constructed shall also be deemed base metal. If either such plating or electroplating is on a stock of precious metal, as for example, "Sterling Silver," the part of the case so constructed shall be known by the name of the metal in the stock, such as in the example given, "Sterling Silver.")

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JAMES R. BROWNING, CL

No. 684

In the Supreme Court of the United States

OCTOBER TERM, 1960

THEODORE KAGEN CORP., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 1a-2a) is reported at 283 F. 2d 371. The opinion and order of the Federal Trade Commission (J.A. 98-104)[1] have not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1960 (Pet. 4a). The time for peti-

[1] "J.A." refers to the Joint Appendix in the court of appeals.

tioning was extended on December 27, 1960 by Mr. Justice Brennan to January 30, 1961 (Pet. 5a), and the petition for a writ of certiorari was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioners are engaged in the sale of watchcases to watchmakers and to wholesalers of watchmakers' supplies. Some of their cases, marked only with the phrase "stainless steel back," are composed of stainless steel backs and of front pieces, known as "bezels," resembling gold or silver but made from treated base metal. The Federal Trade Commission ordered petitioners to cease and desist from selling cases "composed in whole or in part of base metal which has been treated to simulate precious metal without clearly disclosing on such cases the true metal composition of such treated cases or parts." The questions presented are as follows:

1. Whether there was substantial evidence to support the Commission's finding that petitioners' practice has a tendency and capacity to deceive a substantial portion of the purchasing public.

2. Whether a cease-and-desist order was proper notwithstanding the alleged consistency of petitioners' conduct with the Commission's Trade Practice Rules and with industry-wide custom, and notwithstanding the Commission's previous failure to enjoin similar conduct of another manufacturer.

STATEMENT

Petitioners, a corporation and its president, are engaged in the sale of watchcases to watchmakers and to wholesalers of watchmakers' supplies (J.A. 2, 7, 9, 92). Many of petitioners' watchcases are two-piece cases, the essential pieces being the back and the bezel (J.A. 96, 99). A bezel is the grooved rim or flange which holds a watch crystal. It is a prominent component of a watchcase and of the finished watch (J.A. 101); when the watch is worn, the bezel is the primary metallic portion of the watchcase that is visible.

The bezels of petitioners' watchcases are made of gold-colored anodized aluminum, chrome-plated steel or stainless steel (J.A. 23, 26, 45, 47, 49-50, 63-64, 68, 79, 80-85, 87). None of these watchcases contain gold or silver.[2] The backs of all are made of stainless steel (J.A. 3, 7, 79-82, 84-88). When these stainless steel backs are incorporated into watchcases with bezels that are of gold-colored anodized aluminum or silver-colored chrome plate, they are marked with the legend "stainless steel back" (J.A. 3, 7, 9, 14, 18, 26, 45, 47, 63-64, 79, 80, 81, 83-88). There are no other marks on these

---

[2] Commission witness Jedlicka, a spectro-chemist, testified that petitioners' bezels were made of "aluminum with a very very thin overlay of some material which has a very faint trace of gold" (J.A. 31, 36), and that the "total value of the gold couldn't possibly be more than just a few pennies" (J.A. 37). Petitioner Kagen, on the other hand, categorically denied that the anodized aluminum parts of petitioners' watchcases contained any gold whatsoever (J.A. 82, 83, 87, 88).

cases to indicate the metallic content of the bezels themselves (J.A. 15, 18, 23, 24, 28, 64, 90).

Other manufacturers' watchcases with stainless steel backs and bezels made of rolled gold plate, gold fill, or gold electroplate are marked on the back with the legend "stainless steel back" (J.A. 54, 59, 61, 77).

Petitioners also sell certain watchcases whose bezels as well as backs are composed of, and have the appearance of, stainless steel (J.A. 49, 64, 80, 84, 85). The backs of these cases are stamped with the legend "all stainless steel case" (J.A. 49, 80, 84).

In Commission proceedings on a complaint under Section 5 of the Federal Trade Commission Act, expert testimony was received before an examiner that only an expert could distinguish on sight between gold and anodized aluminum bezels (J.A. 28, 65-66, 83); that even an expert may be unable so to differentiate (J.A. 10-16, 26); that gold is a more serviceable and longer-lasting watchcase material than base metal, and therefore more desirable (J.A. 25-26); and that petitioners' watchcases were not marked in such a manner as to identify the base-metal composition of the apparently gold bezels (J.A. 99, 101). The examiner concluded (J.A. 96-98) that the "sale and distribution of watch cases having bezels made of a base metal which has been so treated as to have the appearance of a precious metal, without disclosing the actual composition of such bezels, clearly has the tendency and capacity to mislead the purchasing public as to the content of the bezels"; and that petitioners were engaged in unfair and deceptive acts and practices and unfair methods of competition in interstate

commerce. He proposed a cease-and-desist order (J.A. 97-98). On appeal, the Commission adopted the initial decision as its own (J.A. 99-104), and issued the examiner's proposed order directing petitioners to cease and desist from:

> Offering for sale or selling watch cases composed in whole or in part of base metal which has been treated to simulate precious metal, without clearly disclosing on such cases the true metal composition of such treated cases or parts. [J.A. 97-98]

The court of appeals, interpreting the order to permit compliance by identification of the treated watch cases as composed of "base metal," affirmed *per curiam* (Pet. 2a).

ARGUMENT

1. While petitioners admit that a finding of tendency and capacity to deceive members of the public (as distinguished from actual deception) is sufficient to support a cease-and-desist order (Pet. 18), they argue that the Commission finding of such tendency and capacity is not supported by substantial evidence. This Court recently pointed out, however, that "substantiality of evidence on the record as a whole to support agency findings 'is a question which Congress has placed in the keeping of the Courts of Appeals.'" *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401. The court of appeals here found that "[s]ubstantial evidence supports [the] finding" of the Commission that "base-metal bezels of petitioners' watch cases could be mistaken for precious metals, because of their appear-

ance, in the absence of clear disclosure to the contrary" (Pet. 1a). Petitioners make no claim that the court below did not apply the proper standard in testing the sufficiency of the supporting evidence.

2. Petitioners also rely on their alleged adherence to the Commission's Trade Practice Conference Rules for the Watch Case Industry, 16 C.F.R. 174.2(b), and to general trade practice. But, as they again admit (Pet. 17), the widespread nature of an illegal practice is no defense to a charge of unfair competition. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483. And the cases make clear that the Trade Practice Rules, which on their face (see Pet. 7a-9a) appear to preclude petitioners' type of markings, are in any event merely advisory and cannot bar the Commission from issuing an order in the public interest to prevent illegal practices, even where it is clear that the rules have been followed. *American Life and Accident Insurance Co.* v. *Federal Trade Commission*, 255 F. 2d 289, 292 (C.A. 8), certiorari denied, 358 U.S. 875; *Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F. 2d 7, 13 (C.A. 2). See also *Northern Feather Works, Inc.* v. *Federal Trade Commission*, 234 F. 2d 335, 338 (C.A. 3); *Book-of-the-Month Club* v. *Federal Trade Commission*, 202 F. 2d 486, 489 (C.A. 2).

3. Finally, petitioners argue that the Commission failed to follow a prior administrative ruling dismissing without prejudice a similar complaint against another watchcase manufacturer. But the Commission gave full consideration (J.A. 102-103) to its previous action, which was based not only on different

facts but on an insufficiency in the complaint not present here. In any event, "[a]n administrative agency, charged with the protection of the public interest, is certainly not precluded from taking appropriate action to that end because of mistaken action on its part in the past." *National Labor Relations Board* v. *Baltimore Transit Co.*, 140 F. 2d 51, 54-55 (C.A. 4), certiorari denied, 321 U.S. 795. See also *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 227-228; *Niagara Falls Power Co.* v. *Federal Power Commission*, 137 F. 2d 787, 792 (C.A. 2), certiorari denied, 320 U.S. 792.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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FEBRUARY 1961.

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